

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RON C. KELLY, et al.

PLAINTIFFS

vs.

No. 3:00CV171-D-A

WACKENHUT CORRECTIONS
CORPORATION; BERT MORRIS, et al.

DEFENDANTS

OPINION

Presently before the court is the Plaintiffs' motion to remand this cause to the Circuit Court of Marshall County, Mississippi. Upon due consideration, the court finds that the motion should be granted and this cause remanded to state court for ultimate resolution.

A. Factual and Procedural Background

The Plaintiffs in this wrongful death action allege that the Defendants, Wackenhut and Bert Morris, engaged in either negligent or intentional conduct that resulted in the October 16, 1996, beating death of Ron Kelly while he was incarcerated at Wackenhut's Marshall County Correctional Facility. The Plaintiffs filed the original complaint in this action on October 14, 1999; they filed an amended complaint on February 2, 2000. Wackenhut then removed the case to this court on February 24, 2000, asserting diversity as the jurisdictional basis for removal. On March 27, 2000, the Plaintiffs motioned the court to remand this matter to the state court. The court granted the Plaintiffs' motion on May 12, 2000, and this case was remanded. The Defendants now, once again, have removed the case to this court, again asserting diversity of citizenship as the jurisdictional basis for removal. On November 13, 2000, the Plaintiffs motioned the court to again remand this matter to the Circuit Court of Marshall County.

B. Standard for Remand

28 U.S.C. § 1446(b) provides, in pertinent part, that

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.

28 U.S.C. § 1446(b).

Although 28 U.S.C. § 1446(b) permits a defendant to remove an action to federal court on the basis of diversity jurisdiction at any time up to one year after commencement of the action, the Fifth Circuit has long imposed a significant limitation upon the removal of such actions. Namely, the Fifth Circuit applies the “voluntary-involuntary” rule to determine whether a cause of action is removable pursuant to 28 U.S.C. § 1446(b) once the plaintiffs and defendants in the action become diverse within the meaning of 28 U.S.C. § 1332. Weems v. Louis Dreyfus Corp., 380 F.2d 545, 547 (5th Cir. 1967).

The voluntary-involuntary rule provides that a case, such as this one, that is non-removable on its initial pleadings can only subsequently become removable pursuant to a voluntary act of the plaintiff. Phillips v. Unijax, Inc., 625 F.2d 54, 56 (5th Cir. 1980); Weems, 380 F.2d at 547; Miller v. Fulton, 113 F. Supp. 2d 1035, 1039-41 (S.D. Miss. 2000); Gandy v. Crompton, 55 F. Supp. 2d 593, 596 (S.D. Miss. 1999); see Horton v. Scripto-Tokai Corp., 878 F. Supp. 902, 907 (S.D. Miss. 1995) (“An action not removable as originally filed must remain in state court unless the plaintiff does something voluntarily to change the nature of the case and render it removable.”). In other words, under the voluntary-involuntary rule, when the change in circumstances in a case that creates federal

diversity jurisdiction does not result from a voluntary act of the plaintiff, the action is not removable under section 1446(b) to federal district court. Weems, 380 F.2d at 547-48.

C. Discussion

Here, the change in circumstances that the Defendants maintain renders this case removable was not a result of a voluntary act of the Plaintiffs. Rather, it was an act of the Defendants, specifically the filing of an out-of-time answer by Morris, that caused the change in circumstances now cited as grounds for removal. Pursuant to the previously cited long-standing Fifth Circuit authority, such acts do not render this case removable. Remand of this case to state court, therefore, is proper on this ground alone. Indeed, even if Morris were to be dismissed from this action by the state court, which he has not been, this action would still not be removable, based on the voluntary-involuntary rule. Weems, 380 F.2d at 547-48.

Further, the court finds, as it did in its previous opinion, that the Defendants have not shown that there is absolutely no possibility that the Plaintiffs will be able to establish a cause of action in state court against Morris. The court again finds, therefore, that Morris was not fraudulently joined by the Plaintiffs. As such, this case is not removable by the Defendants because an action such as this “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b). Here, Morris, a citizen of Mississippi, the State in which this action was brought, has been properly joined and served. As such, this case is not removable to this court.

In sum, the court holds that it is without subject matter jurisdiction to adjudicate this cause, and this case is properly remanded to the Circuit Court of Marshall County for ultimate resolution.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of January 2001.

_____/s/_____
Chief United States District Judge

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ORDER GRANTING MOTION TO REMAND

Pursuant to an opinion issued this day, it is hereby ORDERED that

- (1) the Plaintiffs' motion to remand (docket entry 9) is GRANTED; and
- (2) this cause is hereby REMANDED to the Circuit Court of Marshall County, Mississippi.

SO ORDERED, this the ____ day of January 2001.

_____/s/_____
Chief United States District Judge